SUPREME COURT, U.S.
FILED

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In The

# Supreme Court of the United States

**Jerry O'Neil, on behalf of Himself,**
**His Clients and His Constituents,**
Petitioners,

v.

**Montana Supreme Court Commission on the**
**Unauthorized Practice of Law and the**
**Montana Supreme Court,**
Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of the State of Montana

## PETITION FOR WRIT OF CERTIORARI

**Jerry O'Neil**
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Representing himself

January _____, 2007

## THE QUESTIONS PRESENTED

Is it improper when the Judicial Branch of a state first authorizes a layman (who is not incarcerated) to sit at the counsel table and prepare court documents for a prisoner who otherwise would not have meaningful access to the court, and then, under unauthorized practice of law rules, penalizes the layman for giving such aid?

Is it improper when the Judicial Branch of a state penalizes a non-prisoner, contrary to well established principles which provide prisoners meaningful access to the courts, for requesting authorization to help prisoners and other indigents who otherwise do not have meaningful access to the court?

## EXPLANATION

In 1997, Ernest Wilcock was in the Flathead County jail on a felony charge when his wife filed for divorce. He unsuccessfully searched for an attorney to represent him in the divorce. After failing to find a state licensed attorney, he asked me to represent him in the divorce and I petitioned the Montana 11th Judicial District Court, Judge Curtis presiding, for permission.

Judge Curtis ~~allowed me~~ to sit at the counsel table with, and prepare the necessary documents for, Ernest. Judge Curtis and Ernest were satisfied with the help I gave.

In 2005, the Montana 11th Judicial District Court, Judge Christopher presiding, ruled that my request to help Ernest, my sitting at counsel table with him, and my preparing documents for him, each constituted the unauthorized practice of law.

Did my request to help Ernest, and the help I gave him with the Court's authorization, constitute the unauthorized practice of law from which I should be enjoined?

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### STATUTES AND RULES INVOLVED

### MONTANA CODE ANNOTATED

**MCA § 37-61-201 Who considered to be practicing law.** Any person who shall hold himself out or advertise as an attorney or counselor at law or who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a

court or who shall engage in the business and duties and perform such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession for the purposes of parts 1 through 3 of this chapter shall be deemed practicing law. . . . . 1,2,15

**MCA § 37-61-210. Penalty for practicing without license.** If any person practices law in any court, except a justice's court or a city court, without having received a license as attorney and counselor, he is guilty of a contempt of court. . . . . 1,2,15,22

**RULES - MONTANA COMMISSION ON UNAUTHORIZED PRACTICE OF LAW**

**RULE TWO. DEFINITIONS**

**Rule 2(h) Unauthorized Practice of Law.** "Unauthorized Practice of Law" means the practice of law without being first duly qualified, as prohibited by statute, court rule, or case law of the State. . . . . 1,2

**Rule 8(a) Civil Injunctive Proceedings.**

**Rule 8(b)(1) Civil Contempt Proceedings.** A civil contempt proceeding for unauthorized practice of law, as provided by § 37-61-210, MCA, or other applicable statute or law, shall be prosecuted in the manner provided by § 3-1-501 et seq., MCA. . . . . 2

## OPINIONS BELOW

The opinion of the Montana Supreme Court is reported at 206 MT 284 (11/08/06) and is reprinted at Pet. App. 1 - 31.

The *Judgment and Permanent Injunction* of the Montana Eleventh Judicial District Court in Cause No. DV 02-378B is reprinted as Pet. App. 32 - 43.

## BASIS FOR JURISDICTION

The Montana Supreme Court entered its Opinion on November 08, 2006 (Pet. App. 1 - 31). Petitioner filed a *Petition for Rehearing* (Pet. App. 58-60), which was denied on December 06, 2006 (Pet. App. 61-62). This Court has jurisdiction under 28 U.S.C. § 1257. This action is challenging the constitutionality of Montana Code Annotated §§ 37-61-201 and 37-61-210 and Rule 2(h) of the Montana Commission on Unauthorized Practice of Law (Pet. App. 103-105); therefore 28 U.S.C. § 2403(b) may apply.

## STANDING

Besides having an injunction placed against him which interferes with his right to pursue his chosen vocation and to give help to those in need, Petitioner should be accorded standing to represent the interests of the future prison inmates and other indigent litigants who would be his clients, on a basis equal to how physicians' assistants are given standing by the Montana Supreme Court to represent the interests of those who in the future will desire abortions [***Armstrong v. State***, 989 P.2d 364 (Mont. 1999)].

Similarly, in *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611-12 (9th Cir. 2005), the Ninth Circuit reasoned:

In *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. at 950, for example, a for-profit company that charged charities a fee for raising funds on their behalf brought a First Amendment challenge to a Maryland statute that prevented charities from paying more than 25% of their funds as expenses. Although the plaintiff was not itself a charity and did not allege that its own First Amendment rights were infringed, *id.* at 955, the Court concluded that the company had overbreadth standing to pursue the claim. The Court reasoned that, as a result of the statute, charities were reluctant to contract with the plaintiff because it charged fees in excess of 25% and that the plaintiff's impetus to challenge the statute was therefore consonant with the charities' First Amendment interests. *Id.* at 958 ("The activity sought to be protected is at the heart of the business relationship between Munson and its clients, and Munson's interests in challenging the statute are completely consistent with the First Amendment interests of the charities it represents.")

## STATUTES AND RULES INVOLVED

This case involves Montana Code Annotated sections 37-61-201 and 37-61-210 and the rules of the Montana Commission on Unauthorized Practice of Law, Rule 2(h) and Rule 8(b)(1). The pertinent provisions are reproduced above at pages v - vi, and in the Appellant's Appendix at pages 103 - 105.

## STATEMENT OF THE CASE

There are two questions presented by this case;

One: Does a prisoner or other indigent, who is unable to find an attorney, have the right to have a well qualified layman petition the court for permission to help him/her access the court?

Two: With the court's permission, can the well qualified layman, who is not a prisoner, advise, prepare documents for, and sit with, a prisoner at counsel table in the courtroom?

## FACTUAL BACKGROUND

Presently I serve in the Montana State Senate. I am familiar with the law, having foreclosed a lien to protect my family's business interests in *O'Neil Lumber Co. v. Nickelodeon Companies*, 617 P.2d 1291 (Mont. 1980). I also sued a destructive cult for their invasion of my children's and my privacy in *O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho, 1986).

In 1991, as a well qualified layman who is committed to making the courts more responsive to the public, I petitioned for permission to help Karen Sparks in a criminal case in the Whitefish City Court. (Pet. App 69-85). Although I was not allowed to help her, the filing of my petition helped persuade the Court to make sure she got some *pro bono* representation. The Montana Supreme Court used the case to rule that the statutory right to appear for others in courts of limited jurisdiction applies on a one time only basis. (*Sparks v. Johnson*, 252 MT 39, 826 P.2d 928, 49 St. Rep. 124 (MT 1992).

There was no help available for Sparks' prior to the filing of my request. In *Petitioners' Response to Respondents' Briefs and Their Motion to Deny Petition*, which was served on the Whitefish City Attorney and the Montana Assistant Attorney General on December 3, 1991, to show her inability to get

licensed counsel, Karen and I stated:

> When Karen Sparks was brought before the Whitefish City Court on the charge of misdemeanor theft the consequences to her were likely to be of major significance. Although it wasn't a jailable offense which would trigger her right to have a court appointed attorney, it still had the ability to deprive her of a major property interest. Karen works for a bank and if found guilty of theft would lose her job. Just being charged with it put her on personal leave without pay. By the time she went to O'Neil for help, she had not received her salary for over thirty days. She was broke.
>
> Judge Johnson refused to appoint an attorney for Karen because she stated on her *Financial Affidavit and Request for Court Appointed Counsel* that she had personal property with a collective value of $15,000.00. But when looking at this request two things are apparent. One, the sum of the items listed only totals $10,550.00.

| | |
|---|---|
| Emerson TV | $600.00 |
| Microwave | $750.00 |
| Living room furniture | $1,000.00 |
| dining room set | $1,200.00 |
| waterbed | $1,400.00 |
| antique buffet | $2,000.00 |
| washer, dryer | $1,200.00 |
| stove | $250.00 |
| refrigerator | $500.00 |
| woodstove | $1,500.00 |
| humidifier | $150.00 |

Total $10,550.00

Two, all the items listed are of such a nature that Karen would suffer serious detriment if she were forced to convert them to cash to retain counsel. It is obvious she has never had to pawn something in order to raise money. Also, from the wording of the *Financial Affidavit*, it is doubtful she understood that the value she should have listed is that which she would be able to raise on a forced sale of the items. It is too bad that she didn't have the help of someone such as O'Neil when she was filling out the affidavit.

In her search for an attorney everyone she approached (prior to O'Neil) demanded a cash retainer of at least $400.00 prior to taking the case. Most of them also quoted a rate of at least $60.00 per hour. She would have had to raise and given at least $1,000.00 to an attorney long before she received another pay check from her employer. To raise this money in the time allowed Karen would have had to pawn her household furnishings or to sell them at auction. She would have been lucky to receive ten cents on the dollar for them. At that rate she would have had to pawn the stove she heated her house with in order to hire an attorney. Would the attorney be able to keep her pipes from freezing?

*Petitioners' Response to Respondents' Briefs and to their Motion to Deny Petition*; Dec. 2, 1991, filed in the Supreme Court of the State of Montana (Pet. App. 69-85, at 74-75).

Although no attorney was available for Karen Sparks prior to our request, the Court did find an attorney for her after it

received our request.

In 1997 Ernest Wilcock was sitting in jail waiting trial on a felony charge and was represented by a public defender when his wife filed for divorce. His public defender was unable to help him with the divorce and Ernest was unable to get any other licensed attorney. His need for and inability to get an attorney is stated in the *Affidavit of Ernest B. Wilcock*:

> 1. Respondent is presently incarcerated in the Flathead County jail and it appears likely that Respondent will remain incarcerated there for the immediate future.
>
> 2. Respondent has been served a summons and petition for dissolution of marriage in this cause.
>
> 3. Respondent is not versed in marital law and is not capable of representing himself in this action.
>
> 4. Respondent has attempted to contact by phone over one-half of the attorneys listed in the Kalispell telephone book that advertise they practice family law. Because Respondent is in jail he has been forced to phone collect and some of the listed attorneys refused to accept his phone call. None of the contacted attorneys have agreed to represent Respondent in this case.
>
> 5. While Respondent has some personal property, he does not have any cash with which to pay an attorney. The major assets of the marriage include a 1979 pickup with camper, in which it is likely Respondent will need to reside when he is released from jail; stocks at Wal-Mart, which likely have a value of about $1,200.00, which are currently in Wife's possession, an antique bed and dresser which Wife is currently using as furniture; an antique gramophone

which is in Wife's possession and an antique 45-70 rifle, also in Wife's possession. Respondent believes the best way to pay attorneys without depriving Wife and the children of the essentials of life, and while keeping Wife's retirement intact, would be to use the antique 45-70 rifle.

6. Respondent phoned Jerry O'Neil who advertises as a typing service in the yellow pages. Jerry O'Neil was willing to accept Respondent's collect phone calls and is the only person Respondent has located who is willing to accept Respondent's personal property in payment for his services.

7. While Jerry O'Neil is not licensed to practice law in the State of Montana, he is licensed as an advocate and counselor before the Blackfeet Tribal Court and before the Confederated Salish and Kootenai Tribal Court. These courts follow the Montana statutes which relate to family law. In addition, Jerry O'Neil has drafted, lobbied for, and succeeded in getting enacted as law in the Montana Legislature, statutes regarding dissolution of marriages. Mr. O'Neil has also participated in the formulation of the Montana Child Support Guidelines. Jerry O'Neil is knowledgeable about Montana laws relating to families and divorce.

8. Jerry O'Neil is the only advocate Respondent has available and Respondent desires that Jerry O'Neil be allowed to represent him in this cause.

*Affidavit of Ernest B. Wilcock,* Pet. App. 100-102.

At a hearing held on December 17, 1997, when considering how she could best allow Ernest to access the Court, the Honorable Katherine R. Curtis authorized me to sit at the

counsel table with, and give advice to, Ernest:

> Mr. O'Neil, I cannot admit you to the practice of this court. The laws of the State of Montana do not allow me to do that. You may stay where you are, you may advise Mr. Wilcock in whatever manner you and he deem appropriate, but he's got to speak for himself; okay?

Transcript of Proceedings, Flathead County Dist Crt, December 17, 1997, No. DR-97-536(B), pg 4, ln 3; (Pet. App. 86-95, at 88).

As further authorization of my services, later in the proceedings (Pet. App. 92-93), when Ernest asked the Court to appoint him counsel, Judge Curtis responded:

> Okay. Mr. Wilcock, we don't have procedures in Flathead County for appointing counsel for people in civil cases, which is what this is. Okay? Obviously, in criminal cases we do because you've had a lawyer appointed to represent you.
>
> But in civil cases, cases concerning dissolution of your marriage and matters related to your children, we don't have the resources for the taxpayers of Flathead County to pay for another lawyer for you. Okay?
>
> So you're welcome to represent yourself. You're welcome to have Mr. O'Neil advise you. He can prepare documents for you. He knows what practicing law is, what practicing law isn't, and so, you know, he can advise you. He can't speak for you. But you strike me as someone who is fairly capable of speaking for himself.

With the Court's authorization, I sat at counsel table with

Ernest and prepared the necessary documents for him. In Montana, no matter how onerous, one cannot escape their child support obligation by going bankrupt. With my help Ernest's child support was calculated on his prison earnings, rather than his pre-prison earnings, thus placing him in a viable position to continue his life when he gets out of prison.

## THE PROCEEDINGS BELOW

Neither Judge Curtis nor Ernest had any problem with the help I gave him. But, because of concerns relating to another paralegal, on February 13, 2001, three years after I helped Ernest, Judge Curtis, along with Judges Lympus and Stadler, wrote the Commission on Unauthorized Practice of Law, stating:

> There are two individuals in Flathead County who advertise themselves as "independent paralegals" and who routinely prepare and file pleadings for people initiating or responding to dissolution or child custody proceedings. For a period of time, we directed the Clerk of Court to not accept pleadings prepared by one of these persons (Connie Monroe), because her papers were very deficient in many respects. She apparently has now gotten some training and is asking us to once again accept her papers. We are very reluctant to do so because it would then appear that we were sanctioning the unauthorized practice of law, but we cannot then justify allowing the other individual (Jerry O'Neil) to continue with essentially the same practice.
>
> - - -
>
> We have been somewhat reluctant in the past to raise this matter because of our concern that the legal system is becoming progressively unaffordable for many

> people, and these paralegals are more affordable. However, our local bar, with the assistance of the local Legal Services office, has just begun a *pro bono* project to assist many of these people in getting good, affordable legal advice, so it seems timely to request the Commission to investigate to determine if, in fact, there are litigants who are receiving and acting upon legal advice from these non-lawyers.

February 13, 2001 letter from State of Montana Eleventh Judicial District to James G. Hunt, Chair, Commission on Unauthorized Practice of the Supreme Court of the State of Montana. Pet. App. 67-68.

In response to the February 13, 2001 letter from the Flathead County judges, in July 2002, the Montana Supreme Court's Commission on the Unauthorized Practice of Law filed a *Petition for Finding of Civil Contempt and for Permanent Injunction* against me (Pet. App. 63-66). The Commission requested the Court to find me in civil contempt for engaging in the unauthorized practice of law. Acts alleged included:

> He prepares affidavits of indigency for customers who have paid him to prepare the pleadings. O'Neil attempts to appear on behalf of his customers in court and asserts that he is entitled to appear on behalf of his customers. He advises his customers during court proceedings. (Pet. App. 65).

On January 7, 2005 the Montana Eleventh Judicial District Court, the Honorable Deborah Kim Christopher presiding, entered a *Judgment and Permanent Injunction* against me. The order was based on my previous petition to help Karen Sparks,

and the previous petition to help, and the help I had given to Ernest Wilcock. At page 3 of its *Judgment and Permanent Injunction* (Pet. App. 34, 35), based on the help I had given to Karen Sparks and Ernest Wilcock, it states:

> 11. O'Neil attempts to appear on behalf of others in court by written and verbal motions to the court. . .
>
> 12. O'Neil has appeared at counsel table, or in the courtroom, and advised others during court proceedings.

On page 9 of the *Judgment and Permanent Injunction*, Judge Christopher precludes me from helping others in the future who might be situated similar to how Sparks and Wilcock were situated when she ruled that an indicia of the practice of law which she is enjoining me from includes:

> 3(c). Appearing, or attempting to appear, as a legal representative or advocate for others in a court or tribunal of this state. (Pet. App. 37).

On appeal, the Montana Supreme Court agreed with Judge Christopher on both items. It closed the door on my giving any future help to those without the means to access the court. In its *Opinion* which was filed on November 8, 2006, it stated:

> Just as O'Neil has no First Amendment right to practice law without a license, his customers have no First Amendment right to unlicensed legal representation. The Supreme Court has recognized a First Amendment right to receive legal advice, but that right is limited to clients of duly qualified attorneys consistent with "the State's interest in high standards of legal ethics." *United Mine Workers v. Illinois State Bar*

> *Ass'n*, 389 U.S. 217, 225 (1967). The unauthorized practice statutes are narrowly tailored to target only the provision of legal services in Montana by individuals who have not proven through examination and admission to the bar that they "are qualified and possess a familiarity with [Montana] law." *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611-12 (9th Cir. 2005). There remain ample alternative channels for providing legal services to O'Neil's customers – the thousands of licensed attorneys in Montana.[1]

Opinion, Montana Supreme Court Commission on UPL v. O'Neil, Pet. App. 28.

## STAGE OF PROCEEDINGS WHEN FEDERAL QUESTION WAS RAISED

Petitioner has continually raised the federal question that the people he is advocating for are constitutionally entitled to his help.

In 1991, in *Sparks v. Johnson*, (1992) 252 Mont. 39, 826 P.2d 928, Petitioner joined Karen Sparks in the Montana Supreme Court, arguing:

> It isn't right to forbid Petitioner Sparks the help of O'Neil because of his religious or political practices. The United States Supreme Court stated in In Re Edna Smith Primus, 436 U.S. 412, that:
>
> 1. Collective activity undertaken to obtain

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[1] *Legal Needs of Low Income Households in Montana*, D. Michael Dale, http://www.montanabar.org/mylegalnews/pdfs/Full_Report.pdf, identifies a huge unmet need for civil legal services among low income families in Montana.

meaningful access to the courts is a fundamental right within the protection of the First Amendment.

2. Broad prophylactic rules in the area of free expression are suspect and precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

3. Disciplinary rules should not be utilized to obstruct the distribution of legal services to all those in need of them.

*Petitioners' Response to Respondents' Briefs and to Their Motion to Deny Petition, Sparks v. Johnson*, supra. (Pet. App. 71).

In the dissolution case of *Wilcock v. Wilcock*, Flathead County District Court case number DR-97-536(B), in 1997, Ernest Wilcock and I filed a *Brief on Motion Regarding Representation*, in which the federal question was argued:

10. According to Bounds v. Smith, 430 US 817 (1977), regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. This is also iterated in Procunier v. Martinez, 416 US 396, 419, 94 S.Ct. 1800, 1814, 40 L.Ed.2d. 224 (1974).

11. The Supreme Court has also recognized that prisoners "have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 821, 52 L.2d.2d 72, 97 S.Ct.1491 (1977). This right has been characterized as "fundamental." Id. at 828. The Court has described it as an element of both the First Amendment right to petition the government for redress of grievances, Hudson v. Palmer, 468 U.S. 517, 522, 82 L.Ed.2d 293, 104 S.Ct. 3194(1984),Cruz v. Beto, 405 U.S. 319, 321, 31 L.Ed.2d 263, 92 S.Ct. 1079 (1972) (per curiam), and the Due Process clause, Wolff v.

> McDonnell, 418 U.S. 539, 579, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974). It appears in significant part to be based on the same concerns that animated Boddie. Because prisoners are typically indigent, often ignorant and illiterate, and due to their confinement generally unable to avail themselves of traditional modes of legal assistance, the state must provide them with law libraries and allow them access to some form of legal assistance. See Bounds, 430 U.S. at 821-25. Like the filing fee cases, the prisoner cases are founded in large part on the importance of the rights concerned and the prisoners' inability to vindicate them through non-judicial pathways.

*Brief on Motion Regarding Representation*, Pet. App. 96-99.

In my *Answer to Petition, and Demand for Jury Trial*, in the Montana Eleventh Judicial District Court, Flathead County, Case Number DV-02-378(B), I raised the federal question on pg 3, under **Allegations**:

> 1. Respondent admits the Montana Supreme Court Commission on the Unauthorized Practice is "authorized and empowered to act in these matters by the Montana Supreme Court," but pleads that such authorization and empowerment is unlawful and unconstitutional.
>
> 2. Respondent admits he is a resident of Flathead County.
>
> 3. Respondent denies he has been and is engaged in the Unauthorized practice of law.
>
> 4. Respondent admits that he is not licensed by the State of Montana to practice law, but states he is and was lawfully licensed or authorized to perform the actions alleged in paragraphs 3 and 6 of the Petition.

Respondent, as a licensed member of the Blackfeet Bar, has insufficient information or belief to know if he is, or is not, "recognized" by the State Bar of Montana as an attorney in Montana.

5. Respondent admits that MCA § 37-61-201 is entitled "**Who considered to be practicing law,**" The statute is flawed in its construction and does not offer adequate notice. It is both over broad and vague. Respondent contends that this Statute and any case law built upon this flawed statute are unconstitutional. Therefore Respondent denies that, "the practice of law is defined by MCA § 37-61-201."

Respondent also admits that MCA § 37-61-210 states: "If any person practices law in any court, except a justice's court or a city court, without having received a license as attorney and counselor, he is guilty of a contempt of court." But Respondent pleads that this statute is also unconstitutional because it is vague in that it has no meaningful definition of what constitutes the practice of law. It is also unconstitutional because it could be construed to prevent someone from representing themself in court and is also unconstitutional because it could be construed to prevent someone from helping those who have no way to achieve justice without help from someone who is not licensed with the bar association monopoly. Furthermore, it is unconstitutional because it would deny due process to those cited under it. Therefore Respondent denies that violation of MCA § 37-612-201 is a contempt of court pursuant to MCA § 37-61-210.

I also raised the federal question in the Montana Supreme Court in *Appellants' Opening Brief*, where I stated:

There is a fundamental right to access the courts. This right has been found to exist for prisoners in ***Johnson v. Avery***, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (February 24, 1969) and ***Bounds v. Smith***, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72. As explained in ***Lewis v. Casey***, 518 U.S. 343 (June 24, 1996):

"Bounds did not create an abstract, free-standing right to a law library or legal assistance; rather, the right that Bounds acknowledged was the right of access to the courts. E.g., 430 U.S. at 817, 821, 828. Thus to establish a Bounds violation, the "actual injury" that an inmate must demonstrate is that the alleged shortcomings in the prison library or legal assistance program have hindered or are presently hindering, his efforts to pursue a non-frivolous legal claim.

Those seeking a divorce also have a constitutionally protected right to access the courts. ***Boddie v. Connecticut***, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (March 2, 1971)."

*Appellants' Opening Brief* (Pet. App. 136).

## ARGUMENT

### I. THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF HOW A COURT'S APPLICATION OF UNAUTHORIZED PRACTICE OF LAW PROVISIONS IMPACT PRISONERS' MEANINGFUL ACCESS TO COURT.

It has long been held that prisoners may help (other) prisoners access the courts.

> The preparation of petitions must never be considered the exclusive prerogative of the lawyer. Laymen – in and out of prison – should be allowed to act as "next friend" to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar. . . Reasonable access to the courts is a right (secured by the Constitution and the laws of the United States), being guaranteed as against state action by the due process clause of the Fourteenth Amendment." ***Johnson v. Avery***, 393 U.S. 483, (1969).

There is a fundamental right to access the courts, which attaches to those seeking a dissolution of their marriage:

> In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due

> Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, [401 U.S. 371, 383] for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to a judicial process entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

*Boddie et al. v. Connecticut et al.*, 401 U.S. 371 (1971)

Ernest Wilcock had a constitutional right to access the court when he was incarcerated in the Flathead County jail on a felony violation when his wife sued him for dissolution of their marriage. The divorce case went in front of the Honorable Katherine Curtis, District Judge of the Eleventh Judicial District. He was a pauper and did not have access to a law library or the ability to prepare the necessary documents. The court would not appoint an attorney for him and he was unable to find one who would take the dissolution case on a pro bono basis. I was the only help available for Wilcock.

Recognizing the necessity of Wilcock having some help, Judge Curtis allowed me to sit at counsel table with him and to prepare the documents which needed to be prepared for him.

Prison authorities can apply restrictions to such activity when such restrictions are reasonably related to legitimate penological interests (***Lewis v. Casey***, 518 U.S. 343 (1996). But neither the Court, the detention system, nor Wilcock found any problem with the assistance I provided.

Several years later, because the local judges were concerned about the quality of someone else's paperwork, they included me in their inquiry to the Montana Supreme Court Commission on the Unauthorized Practice of Law. Then the Honorable Kimberly Christopher was brought in from Lake County to hear the case against me.

Based on my asking for permission to help Karen Sparks and Ernest Wilcock; and on my actually helping Wilcock, as directed by Judge Curtis, Judge Christopher found me guilty of the unauthorized practice of law. She has enjoined me from asking any court for permission to help anyone who is not able to get help from a state licensed attorney in the future.

The Montana Supreme Court agreed with Judge Christoper. To justify preventing me, and others similarly situated, from helping litigants such as Karen Sparks and Ernest Wilcock, in its *Opinion*, the Montana Supreme Court states:

> There remain ample alternative channels for providing legal services to O'Neil's customers—the thousands of licensed attorneys in Montana. (Pet. App. 28).

The point they are attempting to make is that it is acceptable for them to infringe the First Amendment rights of myself, my clients and my constituents because "they leave open ample alternative channels for communication of the information" such as was required of the Arizona respondents in *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611-12 (9th Cir. 2005).

But there are **not** "ample alternative channels for communication of the information" available in Montana. As stated in the *Affidavit of Ernest B. Wilcock*:

> Jerry O'Neil is the only advocate Respondent has

> available and Respondent desires that Jerry O'Neil be allowed to represent him in this cause.

Affidavit of Ernest B. Wilcock, Pet. App. 101, 102.

The 3 judges of the Flathead County District Court did not allege there was any other help available during the time I helped Sparks and Wilcock. On February 13, 2001, when they wrote the letter to the Montana Supreme Court Commission on the Unauthorized Practice of Law, they were anticipating that the integrated bar would be expanding its services so the services of independent paralegals would not be necessary in the future. They stated:

> We have been somewhat reluctant in the past to raise this matter because of our concern that the legal system is becoming progressively unaffordable for many people, and these paralegals are more affordable. However, our local bar, with the assistance of the local Legal Services office, has just begun a *pro bono* project to assist many of these people in getting good, affordable legal advice, so it seems timely to request the Commission to investigate to determine if, in fact, there are litigants who are receiving and acting upon legal advice from these non-lawyer.

Letter, 11th District Judges to UPL Commission, Pet. App. 67

While the 3 judges might have been writing to the Unauthorized Practice Commission with the noblest of intentions, the result does not stand Constitutional muster. The wonderful system they thought they had established in 2001 was still woefully inadequate in 2005. This is according to the study: *Legal Needs of Low Income Households in Montana, Final*

*Report - 2005*, by D. Michael Dale. The report is available at: http://www.montanabar.org/mylegalnews/pdfs/Full_Report.pdf,

The report states:

> The Montana Legal Needs Study has identified a huge unmet need for civil legal services among low income families in Montana – probably in excess of 200,000 cases each year for which no legal assistance is available. These legal problems are seen to be highly important to the families involved. Where access to counsel is available, an encounter with the legal system is likely to produce relatively positive attitudes towards the institutions of the law. However, the wide-spread inability to obtain representation is creating very negative attitudes with respect to the legal system.

If for the sake of argument we would speculate that someday the integrated bar would be able to take care of all the unmet legal needs of society, at that time it might be Constitutionally permissible for the Montana Supreme Court Commission on the Unauthorized Practice of Law to bar me from sitting at counsel table with, and preparing documents for, indigent prisoners. But to forbid me from the act of petitioning the court for permission to help someone who has unsuccessfully attempted to retain counsel? That is ludicrous! How will they ever know their system is not working if they bar litigants from asking for help when it isn't?

## II. FINDING ME TO BE IN CONTEMPT OF COURT FOR ACTS WHICH WERE AUTHORIZED BY THE COURT VIOLATES THE DUE PROCESS RIGHTS OF ERNEST WILCOCK AND MYSELF.

According to MCA § 37-61-210, "unauthorized practice of law" is a contempt of court. How can Judge Christopher find, and the Montana Supreme Court endorse, that my actions In Re the Marriage of Wilcock, DR-97-486(B), which were done under the authority of the Wilcock court, and protected under the tenet of *Bounds v. Smith*, are a contempt of court and constitute the unauthorized practice of law when those actions were specifically authorized by Judge Curtis in the court where they took place?

Judge Christopher, and the Montana Supreme Court found that in addition to requesting permission to help Wilcock, my petitioning to the courts for permission to help Karen Sparks in the Whitefish City Court (Sparks v. Johnson, 252 MT 39, 826 P.2d 928, 49 St. Rep. 124 (MT 1992) also constituted the unauthorized practice of law. In *Sparks*, while nobody could be found before I notified the Court that I was available, after I appeared it was arranged for a licensed attorney for her. I never helped her in court.

Opponents' own expert, Mr. Mike Alterowitz, when addressing the propriety of my requesting the court for permission to help litigants, answered my questions as follows:

> Q. Okay. If I were to have filed papers asking the court to let me appear as a non-attorney, would that be appearing in a court?
>
> A. To let you appear as a non-attorney?
>
> Q. Yeah.
>
> A. I guess you are, at that point, asking the court for

permission to appear. So in that situation, that limited kind of document is probably not such an appearance.

Q. Thank you.

A. Because it's respecting - - The point there is it's respecting the authority of the court. It's saying, I respect the authority of the court to determine who may appear before it, and it's ceding to that authority. And in my mind, that's very appropriate. That is exactly what we all need to do is to cede to that authority.

Deposition of Mike Alterowitz, Pet. App. 151, 152.

**IMMEDIATE REVIEW IS URGENTLY NEEDED.**

This Court's review is urgently needed. Petitioner desires to continue to make it possible for prisoners and indigents who have been denied counsel to have reasonable access to the courts.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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